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Supreme Court, U. S.
FILED
JUL 13 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

KARL KLEVE
CINCINNATI, OHIO
Petitioner
vs

RETAIL CREDIT COMPANY
A GEORGIA CORPORATION
ATLANTA, GEORGIA
Respondent

PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT

OF THE UNITED STATES

Case No.

KARL KLEVE
2887 Harrison Ave.
Cincinnati, Ohio, 45211
APPELLANT
vs

RETAIL CREDIT COMPANY
A Georgia Corporation
1600 Peachtree St. NW
Atlanta, Georgia
APPELLEE

PETITION FOR CERTIORARI

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PETITION FOR CERTIORARI

The Ohio Supreme Court denied jurisdiction in this case.

The Decision, per Curiam, of the Court of Appeals, First Judicial District of Ohio, Affirming the Common Pleas Court Ruling is in Appendix, page

The Ruling by the Court of Common Pleas Hamilton County, Ohio, Dismissing with Prejudice, before Trial, is in Appendix, page

GROUNDS FOR JURISDICTION OF THIS COURT

The decree of the Ohio Supreme Court denying jurisdiction was rendered on 25 February, 1972, and Entered on 7 March, 1972. A Rehearing by said Court was denied on 14 April, 1972.

These denials had the effect of making the Court of Appeals the highest State Court to which this appeal could be taken.

The judgment of said Court of Appeals, First Judicial District of Ohio, in Hamilton County, Ohio, was rendered on 8 November, 1971, entered on 24 November, 1971. A Request for Reconsideration by said Court of Appeals was denied on 20 November, 1971.

The Statutory Provisions believed to confer on this Court jurisdiction of this Appeal are:

28 U S C Sec 1257 (2) & (3).

ARTICLE III, U. S. Constitution.

FIRST AMENDMENT, U. S. Constitution.

RULE 19, 1.(a) & (b) of the current "Rules of the Supreme Court of the United States."

The following questions are presented for review:

Can the Appeals Court (or any court) decide against Appellant for the reason that his Motion for New Trial was not fil-

ed timely, when the Record clearly stated that said Motion was filed timely, and in fact had been specifically found so by the Trial Judge, and said issue of timeliness had never been raised or question-in any way by opponent?

Even though Appeals Court obviously had not read the Record, can it assume that failure of Appellant"to file his New Trial Motion within the time provided by law was a basis for overruling the Motion for New Trial"?

Should Plaintiff-Appellant be totally and finally prevented, by all courts, from ever having his traditional Day-in-Court, a hearing on his merits, for redress of his grievance?

Can the highest Courts sanction the Trial Court's dismissal with prejudice, before trial, because of a delay, completely excused by statute, by Appellant's Counsel, in compliance with a pretrial order concerning procedure?

CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE III: "The Judicial power of the United.States shall be invested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judicial power shall extend to all cases, in Law or Equity, arising under this Constitution, the Laws of the United States,. . . to CONTROVERSIES BETWEEN CITIZENS OF DIFFERENT STATES. . . in all cases before mentioned, THE SUPREME COURT SHALL HAVE APPELLATE JURISDICTION both as to law and fact."

Vol Page

ARTICLE VI: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby"

Vol Page

AMENDMENT I:"No person shall be deprived of. . . property without due process of Law". ("A business is a property right" 28 FCA 284.) and "Right to petition for redress of grievances" Vol Page

AMENDMENT XIV:"No state shall make or enforce any law which shall abridge the privileges . . . of citizens of the United States; nor shall any state. . . deny to any person within its jurisdiction the equal protection of its laws".
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STATEMENT of the CASE

In 1963 & 64, Appellee had published untrue reports on the qualifications of Appellant as an Insurance Agent, so derogatory that Appellant was thereafter never able to secure representation of an insurance company, and was thus forced to discontinue his lifelong profession and 80-year-old business. After making every possible effort to have the reports corrected, without success, Appellant filed a Libel Action.

Appellee answered, first, that it had never issued reports on Appellant, then refused to answer whether it had published reports on Appellant, then, that the reports were improperly discovered and hence inadmissable, and, finally, that the reports were true and not libellous.

None of the merits was ever heard; there was no testimony, only the jury selection & opening statements, when Appellee moved for dismissal, on ground that the Appellant had failed to comply with a Court Order. Appellee had asked, just before trial, and the Court had so ordered, that Appellant turn over to Appellee its file on Appellant which had been given Appellant 5 years previously. Alas, 5 years previously, said file had been brought to counsel for Appellee on a Subpoena Duces

fecum, along with a great quantity of all the records of 20 years of business operations, as demanded by Appellee, and whatever papers as had been considered significant by Appellee had already been entered as exhibits; but that was five years before, and a different attorney was handling the case for Appellee, then.

This new order had been given Appellant directly, not to his counsel, and Appellant had complied with it to the letter, in that it had ordered Appellant to deliver possession of all said papers "in his possession", and Plaintiff-Appellant had done exactly that. But, 5 days later, Appellant's counsel brought to Appellee's counsel several papers from said file which the former had found, mingled with his file when they were all subpoenaed together, so many years before.

At this point in the case, Appellant's counsel was involved in an extreme personal crisis, in that his father lay dying of cancer (a lingering death), said father being also an attorney, and in fact the law partner of counsel, so that, beyond the great emotional stress and preoccupation, counsel was hardppressed to maintain the flow of his father's extensive practice as well as his own. Now, even if it is fair, under the law, to so severely punish a plaintiff for negligence on the part of only his attorney, as to deprive him of his precious, American right to a trial on the merits, in the case on which his whole career depends, the law still provides amply for continuances and extensions for personal hardship.

The Court dismissed the case forthwith, on 24 Nov 70, without prejudice, but after being questioned by Counsel for Appellee, he was handed a note by his constable, and he changed his decision to dismissal with prejudice.

Motion for New Trial was filed, set for hearing, but overruled before the hearing took place.

Appeal was filed, but though Brief and Assignment of Error sought review of the Dismissal with Prejudice, Appeals Court, in its Decision,

did not pass on said Dismissal, but affirmed the overruling of the Motion for New Trial, on the assumption that the Trial Court had found said Motion untimely, although this issue had never been raised nor questioned in any way by either party in either Court, and, in fact, the Trial Court had signed the statement, on 28 June71, included as last page of the Record, that "WITHIN THE TIME PROVIDED BY LAW, PLAINTIFF FILED IN WRITING MOTION FOR NEW TRIAL . . . "

In its Decision of Affirmance, the Court of Appeals stated:

"The Trial Court did not give any reason for its action in overruling the motion for new trial. It must be considered that the failure of the appellant to filw the motion within the time provided by law was a basis for overruling the motion.

"For the reasons given, alleged errors presented in paragraphs 6 & 8 have no merit. Coming on to consider the alleged errors presented in paragraphs numbered 1,2,3,4,5,7,9, 10,11 & 12 (of the Brief and Assignment of Error) in relation to the action of the Trial Court in granting the motion to dismiss, this Court finds there is no merit to those alleged errors for the same reasons given in determining the alleged errors in paragraphs 6 & 8.

"It is therefore ordered by the Court that the judgment of the Court of Common Pleas, Hamilton County, Ohio, be, and the same hereby is confirmed." (End of quotation)

All 12 said paragraphs of Appellant's Brief did deal with various aspects of the Dismissal with Prejudice, except paragraph 8, which referred only to the fact that though the Trial Court had set a hearing on the Motion for New Trial, it had then overruled said Motion before said hearing.

Appellant then appealed to Ohio Supreme Court, submitting these propositions in his "Memorandum in Support of Jurisdiction":

Appeals Court had decided against Appel-

lant on an assumption not supported by the Record and, in fact, clearly contradicted in said Record.

Appeals Court had decided on an issue never plead to it and not contained in the evidence.

Appeals Court had sanctioned dismissal by Trial Court with prejudice which it did not have the power to do under the circumstances.

Thus, Appellant, to this date, has been completely denied his Day-in-Court, so cherished in all legal tradition, for redress of the libels which took from him his life's professional career and livelihood.

The Ohio Supreme Court refused to hear the case.

ARGUMENT

The disposal of this case in Appeals and Common Pleas Courts was so irregular, so far from accepted and usual course of judicial procedings, that it is difficult to find any precedent or statutes applicable to such procedures.

But no case law need be cited to support such a basic notion that a Court, of last resort, especially, owes an Appellant the duty to at least read the Record, if nothing else, before making its decision.

A decision based entirely on an assumption, one directly contradicted in the Record and the statement of the Trial Judge, is wrong.

The Supreme Court of Ohio gave its opinion, in case No 41118, 24 Jan 68, in BAZELL vs CITY of CINCINNATI, 42 O Op2d 137:

"It is particularly dangerous for a Court of last resort to pass upon a claimed error of law, which has not been pointed out to it and briefed by any party, especially where an important question of law is involved - unless such claimed error has been pointed out by a party and argued by brief, an opposing party has no opportunity

to answer the argument or demonstrate that it is without merit. If this Court does not disregard such an error, it runs the unnecessary risk of making an erroneous determination . . . which cannot be corrected on any appeal from its judgment".

This opinion cites Sec 2505.21, Ohio Revised Code:"Errors not specifically pointed out in the Record and separately argued by brief may be disregarded".

This assumed error, in instant case, was not only not pointed out in the Record, but said Record definitely pointed out that there was no such error.

The Ohio Supreme Court, in hearing said Bazell v Cincinnati, and denying hearing of instant case of this Appellant, denied this Appellant the equal protection of the Ohio laws.

"No state shall. . . deny to any person within its jurisdiction the equal protection of its laws" ARTICLE IV, Sec 2, U. S. CONSTITUTION.

Also, "The Courts will not go beyond the issue raised, and decide momentous questions not contained within the framework of the pleadings and the evidence". KOREMATSU v U. S., 323 US 214.

For the Court to dismiss with prejudice for a non-existent violation of a pretrial order, without allowing Appellant to defend against the charge, and without having heard a shred of the merits of Appellant's case, is beyond the power of any Judge; in this case it deprived Appellant of the valuable right to due process of the law. Never in the history of Ohio has a Court had the power to dismiss with prejudice in such a situation.

In FULTON v FULTON, 163 N E 2d 194, an Ohio Court of Appeals, 1958, stated:

"The court was well within its rights in dismissing the action for failure to com-

ply with the order concerning the proceedings. However, it is to be noted that the action was dismissed with prejudice, and the law gives a court the right to dismiss the action ONLY WITHOUT PREJUDICE to another action."

CASES IN SUPPORT OF JURISDICTION

USC 28 Sec 1257(3) "Final judgments. . . rendered by the highest court of a state in which a decision could be had, may be reviewed by the U. S. Supreme Court . . . by writ of Certiorari, where any . . . right, privilege is set up or claimed under the Constitution."

MORRIS v ALABAMA 294 US 587:"The Supreme Court will review the finding of facts by a state court where a federal right has been denied as a result of a finding shown by the Record to be without evidence to support it".

CURTIS v BUTTS 388 US 130,155:"Libel action of the present kind cannot be left entirely to the state libel laws, unlimited by any overriding constitutional safeguard".

BACON v TEXAS 163 US 207:"A judgment of an inferior court could be reviewed where appeal to the highest court of the state had been denied."

U. S. v RICHMOND 177 F Supp 504:"The Supreme Court of the U. S. has the authority under this section to review eithe r by appeal or on writ of Certiorari, final judgments of lower state courts where relatively higher state courts have . . declined to review their judgments. . "

TUCKER v TEXAS 326 US 517:"Where a case involving a federal constitutional right could not be taken to a higher state court, it could be taken directly to the U. S. Supreme Court."

RULES OF THE SUPREME COURT of the UNITED STATES, Rule 19:"1.A review on writ of certiorari . . . will be granted only where there special and important reasons therefor . . (such as) (a)Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court. (b)Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . . or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision "

PROOF OF SERVICE

I, Karl Kleve, say that all parties required to be served have been served copies of the foregoing petition to the U. S. Supreme Court, by depositing copies hereof in a U. S. Post Office Mailbox, with First Class Postage prepaid, addressed to James R. Adams, counsel of record for Appellee, at 2900 DuBois Tower, Cincinnati, Ohio, 45202, on 5 June, 1972.

Be it known that Karl Kleve, deponent herein, personally appeared before me, a
in and for
and declared under oath that the above statement is true.

Respectfully submitted, _____

APPENDIX

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

KARL KLEVE :
Plaintiff : No A 208313
vs :
RETAIL CREDIT COMPANY
Defendant : Nov 23, 1970

BEFORE:
Bettman, J.

APPEARANCES:
Mr. Stanley Goodman and Mr. William Flax, Counsel for Plaintiff
Mr. James Adams, Counsel for Defendant

Mildred K. Schnelle
Court Reporter

EXHIBIT "A"

RULING OF THE COURT

THE COURT: I think the documents produced this morning, copies thereof and the copy of the deposition of Mr. Kleve, ought to be marked and submitted as exhibits in connection with this motion, because the Court can't really proceed solely on the statements of counsel.

(Documents referred to were marked Exhibits Nos 2 & 3 for identification.)

Rule No. 41 (B) permits the Court to grant an involuntary dismissal and, as I read the cases, the question of whether the dismissal will be with or without prejudice is vested in the sound discretion of the Court.

That discretion should, indeed, not be whimsical or done out of pique, but, as Mr.Goodman points out, done only under circumstances which would be considered extreme because it amounts to, of course, depriving the litigant of his opportunity to litigate the case on its merits.

It is the Court's conclusion that the motion should be granted, and the case

should be dismissed without (sic) prejudice, for failure of the plaintiff to comply with the Court's order of November 18 to turn over, by noon on the 19th, to counsel for the defendants, all documents and all papers in the file which were the property of the defendant Retail Credit Company.

The reason the Court feels that this is a case which justifies such an extreme decision is because the evidence of what went on at the deposition, the evidence which has been brought before the Court, indicates that what the plaintiff has been doing, in effect, is obstructing justice and committing a fraud on this court.

This is not an equity case, it is true, but the doctrine that a person comes into court with clean hands is equally applicable in any case.

In the particular case that we have here, the fact that the plaintiff removed the file of the defendant and retained possession of it over the intervening five or so years effectively, in the Court's judgment, deprived the defendant of his opportunity to defend himself.

This is the type of case in which the defendant's records are his sole source of documents to refresh his recollection, find out who the appropriate witnesses are in order to present a case, so that, at this point, a dismissal without prejudice would be, in fact, a dismissal to the prejudice of the defendant.

The record should show that on November 18, in the Court's chambers, at a duly called pre-trial conference, the Court inquired of the plaintiff who was there present with counsel whether he, in fact, had the file of the defendant and he then answered "Yes." And parts of

that file were produced, apparently, on Thursday, and parts on Saturday, and apparently part at this stage in the proceedings, this morning.

It is no excuse that the file, that these particular papers, happened to be in the files, at that point, of counsel. Plaintiff was the person who removed them; plaintiff was the person who had the responsibility of knowing where they were. It is not counsel's fault not to know where these documents were. It is the fault of the plaintiff himself who comes into this Court asking for justice.

The kind of cat and mouse game that apparently went on at the deposition where he said he brought all reports -- the old negative pregnant statement which is not an exact lie but the implications of it are untrue- -is typical of what, apparently, has gone on in this case.

This is not a case of the defendant failing to use its own energies to discover information which the plaintiff had. This is a case of the defendant trying to find out, and get back from plaintiff, its own papers which plaintiff by one way or another has avoided doing up until this time.

I see no basis -- in fact I think it would be a defiance of the inscriptions on the wall of the Courthouse -- to permit the plaintiff to go on with this matter, and the motion to dismiss will be granted.

MR. ADAMS: Excuse me, your Honor. Could I just let the record reflect Your Honor's request that the documents which were returned to counsel for defendant today, which has been marked defendant's exhibit 2, is a sheaf of papers? They were not marked indivisually. Perhaps it would be wise if the reporter would mark

them defendant's exhibits 2 A,B,C,D, etc. And the record should also reflect that a copy of the deposition of Mr. Kleve, dated August 11, 1965, has been marked as defendant's exhibit No 3, and I would at this time like to move the admission of defendant's Exhibits Nos. 2 & 3 into the record at this time.

THE COURT: They will be received.

(Documents previously marked Exhibits 2A thru N, and No. 3 for identification, were received in evidence.(

MR. ADAMS: I suppose for the record I should make one further motion. I would suggest that I make this motion today, and I formally do it by motion memorandum to the Court with proper affidavits and set that matter for hearing. I don't think we need to take the Court's or counsel's time today, but I would like to move for a motion, an order, directing the plaintiff to pay costs of this action and reasonable attorney fees involved with this action. I think there is more than ample authority for such a proposition and I will be supplying the Court with a memorandum and proper supporting affidavits.

THE COURT: A dismissal with prejudice is at plaintiff's costs. As far as fees, that would be an ancillary matter.

MR. ADAMS: Did you say with, or without prejudice?

THE COURT: My constable advises me I had misused the term once, but I think the record should be clear that my dismissal is with prejudice.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

KARL KLEVE : NO 11578
Plaintiff-Appellant
vs : DECISION
RETAIL CREDIT COMPANY
Defendant-Appellee NOV 8 1971

Mr. James R. Rimedio, for Plaintiff-Appellant

Messrs. Frost & Jacobs, James R. Adams and Thomas P. Mehnert of counsel, for Defendant-Appellee.

PER CURIAM.

This cause came on for hearing upon the appeal on questions of law, assignments of error, transcript of the original papers from the Court of Common Pleas of Hamilton County, Ohio, the bill of exceptions, briefs and arguments of counsel.

The twelve claimed assignments of error are in the form of numbered paragraphs in the appelant's brief. In each of these numbered portions of his brief, appellant commingles assignment of error and argument. Specific assignments of error are not expressed. However, it does appear that the paragraphs in appellant's brief numbered one, two, three, four, five, seven, nine, ten, eleven and twelve all refer directly to his claim that the court erred in granting the appellee's motion to dismiss. The paragraphs numbered six and eight appear to be an attempt to present a form of alleged errors committed by the trial court in overruling the motion for new trial.

The paragraphs in appellant's brief relating to the motion for a new trial will be considered first.

The record discloses that the appellant's motion for a new trial filed Janu-

ary 6, 1971, was overruled by entry dated February 8, 1971. That entry does not give the trial court's reason for overruling the motion. Notice of appeal was timely filed.

When the motion for new trial was overruled, the appellant had fourteen days to file a motion for a new trial pursuant to the provisions of Rule 59 B of the civil rules of practice, as amended.

The appellant did not file a motion for a new trial until twenty-nine days after granting of the motion to dismiss.

The trial court did not give any reason for its action in overruling the motion for a new trial. It must be considered that the failure of the appellant to file the motion within the time provided by law was a basis for overruling the motion.

For the reasons given, alleged errors presented in paragraphs six and eight have no merit.

Coming on to consider the alleged errors presented in paragraphs numbered one, two, three, four, five, seven, nine, ten, eleven and twelve, in relation to the action of the trial court in granting the motion to dismiss, this Court finds there is no merit to those alleged errors for the same reasons given in determining the alleged errors in paragraphs six and eight.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas, Hamilton County, Ohio be, and the same hereby is, affirmed.

Counsel will present entry in accordance herewith.

HESS, P.J., YOUNG and SHANNON, J.J.

PLEASE NOTE:

Counsel must present an entry pursuant

to Rule 22, Rules of Appellate Procedure. If such entry is not submitted within the time specified in Rule 22, the Court will prepare and journalize an entry and the time for review will begin to run thereupon.

ENTRY OF ABOVE JUDGMENT was on 24 November, 1971

IN THE SUPREME COURT OF THE STATE OF OHIO

State of Ohio
City of Columbus

1972 Term
to wit 25 Feb 72

Karl Kleve
Appellant
vs
Retail Credit Co.
Appellee

No. 72-3
APPEAL from the COURT of APPEALS for HAMILTON COUNTY, OHIO.

This Cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court, sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this V

Witness my hand and the Seal of This Court this 7th March, 1972,

Thomas L. Startzman, Clerk

(SS) Sam F. Adkins, Deputy.

IN THE SUPREME COURT OF THE STATE OF OHIO

State of Ohio
City of Columbus

1972 Term

Karl Kleve
Appellant
vs
Retail Credit Co.
Appellee

No. 72-3

REHEARING

It is ordered by the Court that REHEARING in this case is denied.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the Seal of This Court this 7th March

Thomas L. Startzman, Clerk
(SS) Sam F. Adkins, Deputy.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-73

KARL KLEVE
Petitioner

vs

RETAIL CREDIT COMPANY
Respondent

BRIEF ON BEHALF OF RESPONDENT RETAIL CREDIT COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The opinion of the Honorable Gilbert Bettman, Judge of the Court of Common Pleas, Hamilton County, Ohio, is not officially reported but is reproduced at pages a-d of the Appendix of the Petition for Writ of Certiorari.

The opinion of the Court of Appeals of the First Appellate District of Ohio, Hamilton County, Ohio, is not officially reported but is reproduced at pages e-g of the Appendix of the Petition for Writ of Certiorari.

The orders of The Supreme Court of Ohio are not officially reported but are reproduced at pages g-h of the Appendix of the Petition for Writ of Certiorari.

STATUTES AND RULES INVOLVED IN THIS PROCEEDING

1. Fed. R. Civ. P. 41(b), reproduced in full at page 7a of the Appendix herein.

2. Ohio R. Civ. P. 41(B), reproduced in full at page 8a of the Appendix herein.

3. Ohio Rev. Code § 2739.02 (1954), reproduced in full at page 10a of the Appendix herein.

STATEMENT OF FACTS

Respondent is engaged in the business of making credit investigations and furnishing confidential reports of such investigations to customers who have requested such information. Petitioner formerly operated a brokerage agency for casualty insurance. In the ordinary course of business, at the request of certain insurance companies, Respondent investigated and prepared various reports concerning Petitioner and his insurance agency. Copies of the reports furnished to Respondent's customers were retained in a separate file, together with notes, memoranda and correspondence to "back up" the information contained in the reports.

Petitioner commenced this action against Respondent on February 20, 1965, in the Court of Common Pleas, Cincinnati, Hamilton County, Ohio. The Complaint alleged that Respondent maliciously circulated false reports concerning Petitioner with knowledge that such reports were false and that, as a consequence, Petitioner's business and personal reputation were damaged. Respondent asserted in its Answer, first, that any reports it had prepared concerning Petitioner were true and, second, that such reports were privileged under the law of Ohio as reports furnished on a confidential basis to customers of an investigative agency who had a need for the information contained in such reports.

Shortly after the commencement of this action, Respondent conducted a search for its file relating to Petitioner's reports but was unable to locate the file. Thereafter, in response to a subpoena duces tecum served in connection with the taking of Petitioner's deposition, he produced fourteen documents taken from Respondent's file and stated "This is all I have of reports," and that he did not have additional reports of a similar character. Petitioner refused to say how he had obtained the documents from Respondent's file or how long he had possessed the documents.

During a duly called and convened pretrial conference held on November 18, 1970, attended by Petitioner and his counsel, Petitioner admitted for the first time that he had possession of Respondent's file. Judge Gilbert Bettman, Judge of the Court of Common Pleas, thereupon entered a Pretrial Order, a copy of which is reproduced at page 1a of the Appendix to this Brief, directing Petitioner to deliver all papers in his possession belonging to Respondent to counsel for Respondent by noon, November 19, 1970. Petitioner returned some of Respondent's documents on November 19, 1970 and an additional set of documents on November 21, 1970, two days after the November 19 deadline. The trial on the merits of this case commenced on November 23, 1970 and on November 24, 1970, fully five days after the November 19 deadline, Petitioner's counsel returned twenty-four additional documents.

Respondent at that point immediately orally moved the trial court to dismiss the case for the failure of Petitioner to obey an order of the Court. Following a hearing and arguments by both parties, the trial court dismissed this action with prejudice for Petitioner's failure to comply with the trial court's Pretrial Order of November 18, 1970 (Appendix, page 1a). The judgment of dismissal was entered on December 7, 1970 (Appendix, page 1a).

Respondent's counsel was served on December 21, 1970 with a copy of Petitioner's motion for a new trial, which was not filed with the trial court until January 6, 1971. *On January 28, 1971, fully seventy days after the November 19, 1970 deadline, Petitioner returned four additional documents taken from Respondent's files.* The motion for a new trial was overruled on February 8, 1971 and Petitioner appealed.

The Court of Appeals for the First Appellate District of Ohio announced its *decision* on November 8, 1971 affirming the judgment of the trial court, following the normal exchange of briefs and oral argument. On November 18, 1971 prior to the filing of an *entry* affirming the trial court, Petitioner filed a Request for Reconsideration, a copy of which is reproduced at pages 2a to 6a of the Appendix to this Brief. The Court of Appeals overruled Petitioner's Request for Reconsideration on November 23, 1971 (Appendix, page 7a) and entered the affirmance of the judgment of the trial court on November 24, 1971 (Appendix to Petition for Writ of Certiorari, page g, hereinafter referred to as "Petition").

Petitioner then sought review by The Supreme Court of Ohio. The Supreme Court dismissed the appeal on its own motion for the reason that no substantial constitutional question existed and overruled Petitioner's Motion to Certify the record of the Court of Appeals for the First Appellate District. Both of these orders were entered on February 25, 1972 (Appendix to Petition, page g). Petitioner sought a rehearing of these orders which The Supreme Court of Ohio denied on April 14, 1971 (Appendix to Petition, page h).

ARGUMENT

The Petition for a Writ of Certiorari in this case should be denied for the following reason:

THE DISMISSAL WITH PREJUDICE OF THE COMPLAINT DOES NOT RAISE A CONSTITUTIONAL QUESTION AND WAS CORRECT UNDER APPLICABLE LEGAL PRINCIPLES.

A. There Is No Constitutional Question In This Case.

It appears that Petitioner's theory of this case is that he was denied due process and equal protection of the law as a result of the dismissal with prejudice of his case by the trial court (Petition, page 3). The Supreme Court has already heard and disposed of a similar argument in *Link* v. *Wabash Railroad Company*, 370 U.S. 626, *reh. den.*, 371 U.S. 873 (1962). That case involved a dismissal with prejudice by the district court, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure (Appendix, page 7a) for the failure of the plaintiff's attorney to appear at a properly called pretrial conference. Mr. Justice Harlan, speaking for the majority of the Court, stated that Rule 41(b) provided very clear authority for the proposition that the district court had the inherent power to dismiss a case for lack of prosecution, or in the context of the *Link* case itself, for failure to attend a pretrial conference. This power of dismissal did not offend considerations of due process (*Id.* at 632). The only question was whether, under the circumstances of the action before the Court, the district court was correct in ordering the case dismissed *with prejudice* (*Id.* at 633). This latter inquiry is one addressed to the discretion of the trial judge under the circumstances of the case (*Id.* at 633). In *Link* the Supreme Court affirmed the dismissal of the case with prejudice after analyzing the procedural background of the particular fact situation (*Id.* at 636).

In response to the argument that the client was being penalized because of an error of his counsel, and that the dismissal with prejudice was visiting the sins of the plain-

tiff's counsel on the plaintiff himself, Mr. Justice Harlan stated:

> But keeping this suit alive merely because the plaintiff should not be penalized for the omissions of his own attorney *would be visiting the sins of plaintiff's lawyer upon the defendant.* (*Id.* at 634, n.10, emphasis added.)

The courts which have considered Rule 41(b) of the Federal Rules of Civil Procedure have also held that Rule 41(b) authorized the dismissal of an action with or without prejudice for the failure of the plaintiff to comply with an *order* of the Court. See *Finley* v. *Rittenhouse*, 416 F.2d 1186, 1187 (9th Cir. 1969); *Maddox* v. *Shroyer*, 302 F.2d 903, 904 (D.C. Cir. 1962); *Package Machinery Co.* v. *Hayssen Mfg. Co.*, 266 F.2d 56, 57 (7th Cir. 1959).

Rule 41(B) of the Ohio Rules of Civil Procedure (Appendix, page 8a) is substantially identical to Rule 41(b) of the Federal Rules of Civil Procedure. Ohio Rule 41(B) in relevant part states as follows:

> (B) *Involuntary dismissal: Effect thereof*
>
> (1) *Failure to prosecute.* For failure of the plaintiff to prosecute or to comply with these rules *or any order of court*, a defendant may move for dismissal of an action or of any claim against him, or the court after notice to the plaintiff's counsel may dismiss the action. (Appendix, page 8a, emphasis added.)

The Staff Notes prepared for the Rules Advisory Committee of The Ohio Judicial Conference, reprinted in relevant part in the Appendix to this Brief on page 9a, state that Ohio Rule 41 is "patterned after Federal Rule 41" (Appendix, page 9a). The Staff Notes clearly indicate that a dismissal under Rule 41 may be with or without prejudice and Rule 41(B) itself provides that a dismissal under Rule

41(B) shall be a dismissal with prejudice *unless otherwise stated*:

> (3) Adjudication on the merits; exception. A dismissal under this subdivision and any dismissal not provided for in this rule, except as provided in subdivision (4) of this subdivision, operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies. (Ohio R. Civ. P. 41(B), Appendix, page 8a.)

Petitioner argues that under the authority of *Fulton* v. *Fulton*, 110 Ohio App. 105 (1959), the trial court lacked the power to dismiss this action with prejudice. However, Petitioner fails to note that *Fulton* was based upon Section 2323.05 of the Ohio Revised Code, which Section was superseded by Ohio Rule 41. See Staff Notes prepared for the Rules Advisory Committee of The Ohio Judicial Conference, Appendix, page 9a.

Petitioner has been afforded ample opportunity to present evidence of why his case should not have been dismissed with prejudice. The first was the hearing on the merits of Respondent's motion to dismiss before the trial court. Petitioner's second opportunity came when he filed a motion for a new trial in that court again urging that it was improper to dismiss the case. Petitioner appealed and, after briefs were filed, argued his case personally before the court of appeals. He filed an application for rehearing urging that the case should not be dismissed. He appealed to The Supreme Court of Ohio where his appeal was dismissed and his request for rehearing denied. Hence, Petitioner has had six separate opportunities in three different courts to present his arguments of why the case should not be dismissed with prejudice. Petitioner has been afforded due process and equal protection of the law. He has had a long day in court with fair and full consideration of his case by several tribunals. *W. R. Grace & Co.* v. *Hargadine*, 392 F.2d 9, 21 (6th Cir. 1968).

B. Any Confusion Concerning the Basis For the Trial Court's Overruling Petitioner's Motion For New Trial Was Resolved By Petitioner's Request For Reconsideration In the Court of Appeals.

Petitioner argues that the court of appeals did not read the record and was in error when it filed its decision (Petition, pages 7 and 8). If the court of appeals did evidence confusion in its decision of November 18, 1971, as to the basis for the trial court's overruling Petitioner's motion for a new trial, the confusion was cured by Petitioner's Request for Reconsideration filed on November 18, 1971 (Appendix, pages 2a-6a. See especially page 4a). Thus, Judge Bettman's (the trial court judge) letter to the parties dated February 1, 1971, a copy of which was attached to Petitioner's Request for Reconsideration (Appendix, page 6a), states unequivocally that Petitioner's motion for new trial "should be overruled for the reason stated by the Court at the time the case was dismissed." (Appendix, page 6a) Prior to the time that the court of appeals approved the final judgment entry affirming the judgment of the trial court, it was made aware of the fact that the trial court considered the merits of Petitioner's motion for new trial and found them wanting.

For purposes of this appeal, it must be presumed that the judgment of the court of appeals affirming the judgment of the trial court was rendered on sufficient grounds and that the court of appeals performed all of the duties imposed upon it *Prendergast* v. *Ginsburg*, 119 Ohio St. 360 (1928). Further, the question is not whether the reasons given by the court of appeals are right, but whether on the record the judgment of the court of appeals is correct. If the judgment of the court of appeals is correct for any reason, it should be affirmed without regard to the reasons which may have been assigned for it *Pfisterer* v. *Toledo, B. G. & S. Traction Co.*, 89 Ohio St. 172 (1913).

Because the court of appeals did not see fit to reverse the judgment of the trial court after learning the proper basis for the trial court's overruling the motion for new trial, the court of appeals must have concluded that the trial court had the discretion to dismiss the action for failure of appellant to comply with the pretrial order of November 18, 1970 and that, on the record, neither the dismissal of the action nor the overruling of the motion for new trial constituted an abuse of discretion.

C. The Trial Court's Dismissal of This Action Was Within the Permissible Range of the Court's Discretion.

An involuntary dismissal under Rule 41(B) of the Ohio Rules of Civil Procedure may be with or without prejudice (Appendix, page 9a). *Jameson* v. *DuComb*, 275 F.2d 293, 294 (7th Cir. 1960); *Joseph* v. *Norton Company*, 273 F.2d 65 (2nd Cir. 1959); *O'Brien* v. *Sinatra*, 315 F.2d 637 (9th Cir. 1963) (all construing analogous Rule 41(b) of the Federal Rules of Civil Procedure) (See Staff Notes, Appendix, page 9a).

Under Ohio law, truth is a complete defense to an action for libel or slander. Ohio Rev. Code, § 2739.02, Appendix, page 10a. Further, the reports of mercantile agencies, such as Respondent's, are subject to a qualified privilege if made in good faith and without knowledge of error *Crist* v. *The Bradstreet Co.*, 9 Ohio Dec. Reprint 618, 15 Weekly L. Bull. 334 (Cincinnati Super. Ct. 1886), *aff'd* 9 Ohio Dec. Reprint 751, 17 Weekly L. Bull. 138 (Cincinnati Super. Ct. 1887), *motion for leave to file petition in error den.* 21 Weekly L. Bull. 68 (Ohio Sup. Ct. 1889).

In the absence of its file, complete and unbroken, Respondent was placed at a serious disadvantage in asserting the defenses available under Ohio law. As became apparent on November 24, 1970 when Respondent was suddenly handed more documents than had been disclosed at the

deposition of Petitioner, the integrity of Respondent's file had been seriously violated while in the possession of Petitioner and, as late as January 28, 1971, Petitioner was unable to say with certainty that all of Respondent's documents had been returned. Under those circumstances, it was not an abuse of discretion for the trial court to conclude that a dismissal with prejudice was appropriate.

CONCLUSION

This case does not involve a substantial constitutional question. *Link* v. *Wabash Railroad Company*, 370 U.S. 626, *reh. den.* 371 U.S. 873 (1962). Under Rule 41(B) of the Ohio Rules of Civil Procedure the trial court had the authority to dismiss this action with prejudice and as the opinion of Judge Bettman makes clear, such dismissal was well within the discretion of the trial court:

> The reason the Court feels that this is a case which justifies such an extreme decision is because the evidence of what went on at the deposition, the evidence which has been brought before the Court, indicates that what the plaintiff has been doing in effect, is obstructing justice and committing a fraud on this court.
>
> This is not an equity case, it is true, but the doctrine that a person comes into court with clean hands is equally applicable to any case.
>
> In the particular case that we have here, the fact that the plaintiff removed the file of the defendant and retained possession of it over the intervening five or so years effectively, in the Court's judgment, deprived the defendant of his opportunity to defend himself.
>
> This is the type of case in which the defendant's records are his sole source of documents to refresh his recollection, find out what the appropriate witnesses are in order to present a case, so that, at this point,

a dismissal without prejudice would be, in fact, a dismissal to the prejudice of the defendant.

The record should show that on November 18, in the Court's chambers, at a duly called pretrial conference, the Court inquired of the plaintiff who was there present with counsel whether he, in fact, had the file of the defendant and he then answered "Yes." And parts of that file were produced, apparently, on Thursday, and parts on Saturday, and apparently part at this stage in the proceedings, this morning.

It is no excuse that the file, that these particular papers, happened to be in the files, at that point, of counsel. Plaintiff was the person who removed them; plaintiff was the person who had the responsibility of knowing where they were. It is not counsel's fault not to know where these documents were. It is the fault of the plaintiff himself who comes into this Court asking for justice.

The kind of cat and mouse game that apparently went on at the deposition where he said he brought all reports—the old negative pregnant statement which is not an exact lie but the implications of it are untrue—is typical of what, apparently, has gone on in this case.

This is not a case of the defendant failing to use its own energies to discover information which the plaintiff had. This is a case of the defendant trying to find out, and get back from plaintiff, its own papers which plaintiff by one way or another has avoided doing up until this time.

I see no basis—in fact, I think it would be a defiance of the inscriptions on the wall of the Courthouse—to permit the plaintiff to go on with this matter, and the motion to dismiss will be granted. (Appendix to Petition, pages b-c.)

For the foregoing reasons, it is respectfully submitted the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DONALD McG. ROSE
JAMES R. ADAMS
FROST & JACOBS
2900 DuBois Tower
511 Walnut Street
Cincinnati, Ohio 45202

Attorneys for Respondent,
Retail Credit Company

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Karl Kleve

vs. A 208313

Retail Credit Corporation (sic)

/s/ BETTMAN, J.

PRETRIAL ORDER

Plaintiff is hereby directed to deliver possesion of all papers in his possession belonging to defendant to counsel for defendant by noon November 19, 1970;

Defendant is ordered to have said papers in its possession at the trial of this cause;

The Court reserves its ruling as to the admissibility of said papers until the trial.

/s/ STANLEY GOODMAN
Atty for Plaintiff

FROST & JACOBS
By /s/ JAMES R. ADAMS
Attorney for defendant, Retail Credit Corporation (sic)

COMMON PLEAS COURT
HAMILTON COUNTY, OHIO

KARL KLEVE, *Plaintiff,*

vs.

RETAIL CREDIT COMPANY, *Defendant*

No. A208313

/s/ BETTMAN, J.

JUDGMENT ENTRY

This cause came on for trial before a jury, and upon the motion of defendant for a dismissal of the within action

with prejudice at the costs of plaintiff for the failure of plaintiff herein to obey an order of this Court, upon the oral arguments of counsel, the authorities submitted and the exhibits presented and admitted by the Court, the Court, being fully advised, does hereby find that said motion is well taken and should be granted.

Therefore, the within action is hereby dismissed with prejudice at plaintiff's costs for the failure of plaintiff to obey an order of this Court all in accordance with the Opinion of this Court which is attached hereto marked as "Exhibit A" and made a part hereof and incorporated into this Judgment Entry as though fully rewritten herein.

To all of which plaintiff excepts.

/s/ WILLIAM FLAX

/s/ STANLEY GOODMAN
Attorneys for Plaintiff

/s/ JAMES R. ADAMS
Attorney for Defendant

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

KARL KLEVE
Plaintiff-Appellant

vs

No. 11578

RETAIL CREDIT COMPANY
Defendant-Appellee

REQUEST FOR RECONSIDERATION

Mr. James R. Rimedio & Mr. Lee Kasson, for Plaintiff-Appellant.

Mr. James R. Adams & Mr. Thomas P. Mehnert, of Frost & Jacobs, Counsel for Defendant-Appellee.

Now comes Plaintiff-Appellant and requests Reconsideration by the Court of its Decision on this Appeal, for

the reason that the text of said Decision indicates some obvious misunderstanding, lack of a complete Record, or clerical mistake of some kind.

Plaintiff-Appellant appealed to this Court the Dismissal with Prejudice, by the Trial Court, not the Overruling of the Motion for New Trial. Though this may not be clear from the Brief and Assignment of Error, it could be confirmed in the Notice of Appeal and Bill of Exceptions, if the Record were complete.

The Dismissal occurred prior to the Motion for New Trial Motion, this would seem irrelevant to this Appeal of fore said Dismissal, which occurred on November 23rd, 1970, could logically be included in any procedures in this Appeal. Even had Plaintiff-Appellant inadvertantly indicated any error bearing on the Overruling of the New Trial Motion, this would seem irrelevant to this Appeal of the Dismissal with Prejudice or any Decision thereon.

In the first paragraph of the second page in the Text of the Decision is stated:

> "The paragraphs numbered 6 & 8 (in Appellant's Brief) appear to be an attempt to present a form of alleged errors committed by the Trial Court in overruling the Motion for a New Trial."

A review of paragraphs 6 & 8 of the Brief and Assignment of Error shows no allegations of error in the overruling of the Motion for New Trial in paragraph 6; said paragraph concerns only the candor of Plaintiff-Appellant and the relative deceptiveness of Defendants, in order to prove that a Dismissal based partly on allegations of lack of candor of Plaintiff-Appellant was erroneous. The only mention of the Motion for New Trial, and there was no mention at all of the overruling of it, was to indicate where written evidence could be found of the allegation. Defendants had made this charge both before and after the Dismissal, basing it on a misconstrued answer Plaintiff had made many years before.

Paragraph 8 of the Brief is not applicable to this Appeal since it does bear on events subsequent to the Dismissal, bearing on the Motion for New Trial, an inadvertant mistake for which Plaintiff-Appellant asks pardon by the Court.

Quoting the sixth paragraph of the second page of the Decision:

> "The Trial Court did not give any reason for its action in overruling the Motion for a New Trial. It must be considered that the failure of the Appellant to file the motion within the time provided by law was a basis for overruling the motion."

Here appears to be further misunderstanding, or that the Record is incomplete. A copy of the letter from the Trial Judge (attached) does give the reason for the Dismissal, that it is the (same) "reason stated by the Court at the time the case was dismissed."

Since the Dismissal had to occur at least 14 days before the time for a Motion for a New Trial, because of the Dismissal, would have run out, said lapse of time could not have been the reason for the Dismissal, and, per the Court's said letter, the reason for the overruling of the Motion for New Trial was the same as the reason for the Dismissal, i.e., some alleged lack of candor of Plaintiff-Appellant plus the negligence of his counsel in matters prior to the Trial. The Record is incomplete in that Counsel for Defendant-Appellee failed to include in the Entry of the Overruling of the Motion for New Trial the reason (above) given by the Trial Court although asked by the Court to "present entry accordingly."

Moreover, Defendant-Appellee never made any motion, pleading or argument, though they did file a Memorandum in Opposition to the Motion for New Trial, they never raised the issue of the late filing of the said Motion for New Trial; neither has Plaintiff-Appellant nor the Trial

Court brought it up. The Trial Court never considered the issue of timeliness because it was never placed before it.

As can be seen in the next paragraph of the Decision, the seventh, the Court, apparently because of these said misunderstandings, "finds-no merit-in said paragraphs 6 & 8," of Plaintiff-Appellant's Brief, and thence finds "the alleged errors presented in paragraphs Numbered 1, 2, 3, 4, 5, 7, 9, 10, 11 & 12, in relation to the action of the Trial Court in granting the motion to dismiss (to have) no merit to those alleged errors for the same reasons given in determining the alleged errors in paragraphs 6 & 8."

Plaintiff-Appellant submits that a late filing of a Motion for New Trial would be such unlikely grounds for a finding of no merit to all the alleged errors in an Appeal of a Dismissal with Prejudice, since there is no question of the timeliness of said Appeal, and since Defendant-Appellee has never brought up the issue, either in the Motion for New Trial proceedings nor in the Appeal of the Dismissal proceedings, either to the Trial Court or to this Court, there certainly must have been some misunderstanding by the Court of the inexpert, inartful Brief and Assignment of Error of Plaintiff-Appellant.

Wherefore, Plaintiff-Appellant pleads with the Court to reconsider its Decision on the issue of the Dismissal with Prejudice rather than on the issue of the overruling of the Motion for New Trial.

KARL KLEVE
Plaintiff-Appellant

I certify that a copy of this Request for Reconsideration has been forwarded by U. S. Mail to the Counsel for the Defendant-Appellee, Mr. James R. Adams, DuBois Tower, Cincinnati 45202, Ohio, on 18th November, 1971.

KARL KLEVE

LETTER

COUNTY OF HAMILTON
COURT OF COMMON PLEAS

Cincinnati, Ohio 45202

February 1, 1971

JAMES R. ADAMS, ESQ.
Attorney at Law
2900 DuBois Tower
511 Walnut Street
Cincinnati, Ohio 45202

MR. KARL KLEVE
4211 Harrison Avenue
Cincinnati, Ohio 45211

Re: *Karl Kleve v. Retail Credit Co. No. A 208313*

Gentlemen:

The above matter is before the Court on plaintiff's motion for a new trial. The Court has reviewed the file and is of the opinion that the motion should be overruled for the reason stated by the Court at the time the case was dismissed.

Please present entry accordingly.

Sincerely,

/s/ GILBERT BETTMAN

GB:nr

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

KARL KLEVE,
Plaintiff-Appellant,

vs.

No. 11578

RETAIL CREDIT COMPANY,
Defendant-Appellee.

ENTRY

This matter was presented to the Court on the Request for Reconsideration filed by the appellant herein for an order of this Court granting said Request for Reconsideration, memorandum in support thereof, and was submitted to the Court.

After due consideration, the Court finds said Request not well taken and ought to be overruled.

Wherefore, it is ORDERED and ADJUDGED that the Request for Reconsideration of the appellant herein be, and the same hereby is, overruled.

RULE 41(b), FEDERAL RULES OF CIVIL PROCEDURE

(b) *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the

close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

CIVIL RULE 41(B), OHIO RULES OF CIVIL PROCEDURE

(B) *Involuntary dismissal: Effect thereof*

(1) *Failure to prosecute.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him, or the court after notice to the plaintiff's counsel may dismiss the action.

(2) *Dismissal; non-jury action.* After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52 if requested to do so by any party.

(3) *Adjudication on the merits; exception.* A dismissal under this subdivision and any dismissal not provided for in this rule, except as provided in subsection (4) of this subdivision, operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies.

(4) *Failure other than on the merits.* A dismissal (a) for improper venue, (b) for lack of jurisdiction over the person or the subject matter, or (c) for failure to join a party under Rule 19 or Rule 19.1 shall operate as a failure otherwise than on the merits.

STAFF NOTES PREPARED FOR THE RULES ADVISORY COMMITTEE OF THE OHIO JUDICIAL CONFERENCE

Rule 41, patterned after Federal Rule 41, governs dismissal of actions. Rule 41, however, does differ in detail from Federal Rule 41. At the same time, Rule 41 differs substantially from § 2323.05, R.C. (Action dismissed without prejudice). The statute covers voluntary and involuntary dismissal of an action without prejudice. Rule 41 also covers voluntary and involuntary dismissal of an action. In addition, however, the rule provides that voluntary or involuntary dismissal, depending upon the particular circumstances, may be with or without prejudice. If the dismissal is with prejudice, the dismissed action in effect has been adjudicated upon the merits, and an action based on or including the same claim may not be retried. In many circumstances in granting a dismissal with or without prejudice under Rule 41, the court must exercise its sound discretion.

Under § 2323.05(A), R.C., the plaintiff has had the right to dismiss his action without prejudice at any time before final submission to the jury or the court (in a non-jury case). And he might dismiss any number of times provided that he did not find himself in difficulty with a statute of limitations. Rule 41 abolishes so broad a liberty for a plaintiff.

. . . . . .

Rule 41(B) Involuntary dismissal.

. . . . . .

Rule 41(B) (1) provides that, upon motion by defendant or upon the court's own motion, plaintiff's claim may be dismissed for plaintiff's failure to prosecute, his failure to comply with the rules, or his failure to comply with a court order. Hence the rule governs dismissal situations somewhat similar to the situations set forth in § 2323.05, R.C. Under the statute, however, dismissal is without prejudice, whereas under the rule the dismissal is with prejudice unless the court's order of dismissal affirmatively provides otherwise.

. . . . . .

Rule 41(B) (3) clearly states that a dismissal under Rule 41(B) is a dismissal with prejudice (i.e., on the merits) unless the order of dismissal provides otherwise or unless Rule 41(B) (4) is applicable, as where the dismissal is based on a lack of jurisdiction over the person of the defendant.

Although Rule 41(B) is a rule which may work to the disadvantage of the plaintiff, it should be kept in mind that Rule 55, governing default judgments, is a rule which may work to the disadvantage of a defendant who fails "to plead or otherwise defend."

SECTION 2739.02, OHIO REVISED CODE

§ 2739.02 Defenses in actions for libel or slander.

In an action for a libel or a slander, the defendant may allege and prove the truth of the matter charged as defamatory. Proof of the truth thereof shall be a complete defense. In all such actions any mitigating circumstances may be proved to reduce damages.